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No. 89-1437

In The

Supreme Court of the United States

October Term, 1989

WANDA RAMEY SUTHERLAND, et. al.,

Petitioners,

v.

KENNETH A. HOLCOMBE, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the court below that police pursuit of decedents' vehicle into a curve, where the decedents lost control and crashed, did not constitute a "seizure" comport with the applicable decisions of this Court?

2. Does *Graham v. Conner,* 109 S. Ct. 1865 (1989) require that all claims that law enforcement officers have used excessive force in the course of an arrest or other "seizure" be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach?

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STATEMENT OF THE CASE

Petitioners isolate their description of the circumstances giving rise to the high speed chase by police to the fact that pursuit began when decedents' vehicle "crossed the center line of a city street at an estimated speed of 65 mph." (Petition at 7). They omit that decedent driver ran a roadcheck, escalating his speed as he approached the roadcheck, forcing a deputy off the roadway to prevent being hit. (J.A. 130-31).

The deputies manning the roadcheck gave pursuit but lost the suspects. Deputy Zerfoss advised the Easley City Police dispatcher that decedents' car was headed in the direction of Easley (J.A. 132-35).

Petitioners also incorrectly state at page seven of their petition that the Easley policemen Moore and Waters were not told why decedents were being pursued, as both testified that they were told by the dispatcher that the suspect vehicle has almost run over a deputy sheriff at a roadblock. (J.A. 59, 92).

The policemen observed the decedents' car coming around a sharp curve at a high rate of speed on the wrong side of the road. (J.A. 60). The car turned onto North A Street, then onto Alfred Road, and was leaning and spinning. (J.A. 62-63). Decedents then turned again onto Robert P. Jeans Road, (J.A. 64), where they ran off one side of the road and back to the other, driving erratically and at high speeds. (J.A. 66).

While the policemen got as close as two or three car lengths during the chase, that was the closest they came to decedents' car. When the officers were 250 to 300 feet from the curve at the intersection of Rock Road, they started slow-

ing down because they knew the curve could not be negotiated at that speed. (J.A. 66, 69). Thus, when decedents' car left the road, the police were four or five car lengths behind. (J.A. 68). In this connection, Petitioners refer, at pages 7 and 13 of the Petition, to "photographic evidence that the patrol car actually bumped the decendents' car from the road," but at pages 6 and 13, they acknowledge that the police were two or three car lengths, or at very close range, until they slowed down just before reaching the curve in which decedents lost control. Accordingly, the references to "bumping" were characterized by the court of appeals as mere speculation by counsel.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners cite no decision of a United States court of appeals that even appears to conflict with the Fourth Circuit's ruling; and the Fourth Circuit followed to the letter the precedents of this Court, including *Graham v. Connor,* 109 S.Ct. 1865 (1989), and *Brower v. County of Inyo,* 109 S.Ct. 1375 (1989).

I. THE FOURTH CIRCUIT'S FINDING THAT THERE WAS NO SEIZURE COMPORTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Petitioners in their Question I attempt to equate a dangerous curve with a police roadblock, then argue that this case should be likened to *Brower v. County of Inyo,* 109 S.Ct. 1375 (1989), in which this Court held that the utilization of a

police roadblock to stop a fleeing car thief constituted a seizure. The argument is superficial. Petitioners ignore that the means, roadblock or otherwise, by which a desired termination of freedom is effected must be intentionally applied in order that there be a seizure. In other words, the mere fact that a dangerous curve might produce the same result as did the police-erected roadblock in *Brower,* coupled with the fact that decedents were being pursued when they crashed, does not lead to the conclusion that there was a seizure.

Like the hypothetical situation in *Brower,* the police intentionally pursued decedents and "sought to stop [them] by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means - his loss of control of his vehicle and the subsequent crash," *Id.,* at 1381. Decedents, and they alone, chose the circuitous route by which they reached the dangerous curve, or natural roadblock. There is no reason to believe that had they chosen some other route they would have suffered a different fate, for, as the Fourth Circuit observed, "All high speed pursuits are dangerous." *Sutherland, et. al. v. Holcombe, et. al.,* No. 89-1708, slip op. at 5 n. 4 (4th Cir. Nov. 17, 1989).

In summary, decedents' freedom of movement was terminated when they crashed into a "roadblock" while fleeing the police, just as in *Brower.* Unlike *Brower,* however, the roadblock into which they crashed was not a "police roadblock;" instead, it was a natural roadblock. It was not erected by police, nor were decedents propelled into it by police. Decedents did not lose their freedom of movement "through means intentionally applied."

II. THE FOURTH CIRCUIT'S INTERPRETATION OF *GRAHAM V. CONNOR,* 109 S. Ct. 1865 (1989), TO FORECLOSE PETITIONERS' FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM IS CORRECT.

Petitioners argue that nothing in *Graham v. Connor, Id.,* forecloses a Fourteenth Amendment due process analysis because *Graham* applies only to claims involving seizure, and that since the court has held there was no seizure here, the substantive due process approach should be applied.*

Petitioners' complaints (J.A. 8-17, 26-36) base jurisdiction upon both the Fourth and Fourteenth Amendments, as well as 42 U.S.C. 1983, but the complaints state only a single claim against each defendant, based upon a single set of facts, i.e., a police pursuit culminating in an automobile accident in which decedents lost their lives. Petitioners allege gross negligence and recklessness in various particulars (none of which could have any causal connection with the accident), but all are in the context of the police pursuit which was found not to have constituted a seizure under the Fourth Amendment "reasonableness" standard, far less stringent than the requirements of the Fourteenth Amendment substantive due process standard.

Although the factual situation differed, similar claims were made under both the Fourth and Fourteenth Amend-

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* In Roach v. City of Fredricktown, 882 F2d 294 (8th Cir. 1989), the only pertinent circuit court decision since Graham, the court, after affirming dismissal of the Fourth Amendment claim, did employ a §1983 analysis on a negligence standard - perhaps on an "even if" basis.

ments in *Tennessee v. Garner,* 470 U.S. 901 (1985), but this Court analyzed the claims solely by reference to the Fourth Amendment. Then, when the Fourth and Fourteenth Amendment claims were again raised in *Graham,* this Court said:

> Today, we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force in the course of an arrest...or "other seizure" ... should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Graham v. Connor, 109 S.Ct. at 1871. It follows that *Graham v. Conner* foreclosed petitioners' Fourteenth Amendment substantive due process claim.

CONCLUSION

There is no United States court of appeals decision in conflict with the ruling of the Fourth Circuit, and the Fourth Circuit's decision is in accord with this Court's applicable decisions. Petitioners simply disagree with the Fourth Circuit's finding that the evidence could not sustain a finding of a seizure by police. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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